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TAXATION - FEDERAL ESTATE TAX - WHAT IS A GENERAL POWER OF APPOINTMENT WITHIN THE MEANING OF THE FEDERAL STATUTE?

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TAXATION — FEDERAL ESTATE TAX — WHAT IS A GENERAL POWER OF APPOINTMENT WITHIN THE MEANING OF THE FEDERAL STATUTE? — Decedent exercised her testamentary power to appoint the income of a discretionary trust. The commissioner declared a tax deficiency for failure to include the property subject to the power in the gross estate. The executor appealed on the ground that the power was a special power under Wisconsin law since the trustee could withhold the income from any beneficiary. *Held*, the power was general since it was exercisable in favor of the donee's estate or her creditors and therefore the exercise of the power was taxable under

section 302(f) of the Revenue Act of 1926.[1] *Morgan v. Commissioner*, 309 U. S. 78, 60 S. Ct. 424 (1940).

A general power of appointment is technically defined as one exercisable in favor of "whomsoever the donee pleases." [2] Since the Supreme Court has declared that it is not bound to construe taxing statutes in accord with the intricacies of property law,[3] it is understandable that a different definition may be proper for tax purposes.[4] So the treasury department has defined a general power to be one which, though the possible appointees are limited, is exercisable in favor of the donee, his estate, or his creditors.[5] Such a power, exercisable by will only, has been held to be general for tax purposes.[6] Though the power is to appoint an interest less than a fee, it is not thereby rendered special.[7] Tax uniformity requires that the classification of powers by state law be not determinative as to their taxability. The federal government should be free to formulate its own

[1] This requires inclusion in the gross estate of all property of the decedent except real property situated outside the United States "To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will. . . ." Sec. 302 (f) of the Revenue Act of 1926, 44 Stat. L. 71, as amended by § 803 (b) of the Revenue Act of 1932, 47 Stat. L. 279, 26 U. S. C. (Supp. 1939), § 811 (f). This provision was re-enacted as § 811 (f) of the Internal Revenue Code of 1939, 53 Stat. L. 122.

[2] SUGDEN, POWERS, 8th ed., 394 (1861); 1 SIMES, FUTURE INTERESTS, § 246 (1936).

[3] "The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. . . . Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth." Helvering v. Hallock, 309 U. S. 116 at 118, 60 S. Ct. 444 (1940).

[4] Gump, "The Meaning of 'General' Powers of Appointment under the Federal Estate Tax," 1 MD. L. REV. 300 (1937); Schuyler, "Powers of Appointment and Especially Special Powers: The Estate Taxpayer's Last Stand," 33 ILL. L. REV. 771 (1939); Griswold, "Powers of Appointment and the Federal Estate Tax," 52 HARV. L. REV. 929 (1939); 1 SIMES, FUTURE INTERESTS, § 246 (1936).

[5] "Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power, or, however limited as to the persons or objects in whose favor the appointment may be made, is exercisable in favor of the donee, his estate, or his creditors." Treas. Reg. 80, art. 24 (1937). The principal case holds that Congress has adopted this administrative construction by successive re-enactment of § 302 (f). 309 U. S. at 80. Cf. Hasset v. Welch, 303 U. S. 303, 58 S. Ct. 559 (1938).

[6] Whitlock-Rose v. McCaughn, (C. C. A. 3d, 1927) 21 F. (2d) 164; Fidelity-Philadelphia Trust Co. v. McCaughn, (C. C. A. 3d, 1929) 34 F. (2d) 600; Blackburne v. Brown, (C. C. A. 3d, 1930) 43 F. (2d) 320; Lee v. Commissioner, (App. D. C. 1932) 57 F. (2d) 399; Minis v. United States, 66 Ct. Cl. 58 (1928), cert. den. 278 U. S. 657, 49 S. Ct. 186 (1929).

[7] Fidelity-Philadelphia Trust Co. v. McCaughn, (C. C. A. 3d, 1929) 34 F. (2d) 600; Brown v. Commissioner, 38 B. T. A. 298 (1938); Schuyler, "Powers of Appointment and Especially Special Powers: The Estate Taxpayer's Last Stand," 33 ILL. L. REV. 771 (1939).

concepts.[8] So in the principal case the Wisconsin classification was disregarded. Though exercisable by will only and though the property subject to the power was less than a fee, the power would seem to be a general one, under previous decisions, since there was no limitation upon the persons to whom the donee might appoint, except for the discretion vested in the trustee to withhold the income. Where the power to appoint is exercisable only in conjunction with another, the power has been held to be special since the donee is no longer "practically the owner" of the property subject to the power.[9] This holding has been criticized as opening the door to tax evasion, since the party whose consent is necessary may not have an adverse interest.[10] There would seem to be no reason to extend that doctrine further and apply it to a discretionary trust. In such a case there is only a possibility that the income may be withheld. A sufficient interest remains in the donee to bring it within the incidence of an estate tax.

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[8] Gump, "The Meaning of 'General' Powers of Appointment under the Federal Estate Tax," 1 MD. L. REV. 300 (1937); Schuyler, "Powers of Appointment and Especially Special Powers: The Estate Taxpayer's Last Stand," 33 ILL. L. REV. 771 (1939); Griswold, "Powers of Appointment and the Federal Estate Tax," 52 HARV. L. REV. 929 (1939). See Fidelity-Philadelphia Trust Co. v. McCaughn, (C. C. A. 3d, 1929) 34 F. (2d) 600. Cf. Leser v. Burnet, (C. C. A. 4th, 1931) 46 F. (2d) 756, holding that since the law of Maryland did not permit the donee to appoint to his creditors, the power was special.

[9] Hepburn v. Commissioner, 37 B. T. A. 459 (1938); Gump, "The Meaning of 'General' Powers of Appointment under the Federal Estate Tax," 1 MD. L. REV. 300 (1937); 1 SIMES, FUTURE INTERESTS, § 246 (1936). Cf. In re Watts, [1931] 2 Ch. 302, holding such a power to be special for the purpose of the rule against perpetuities.

[10] Schuyler, "Powers of Appointment and Especially Special Powers: The Estate Taxpayer's Last Stand," 33 ILL. L. REV. 771 (1939). A comparable problem has arisen where a trust revocable only with the consent of the cestui is sought to be included as part of the decedent settlor's estate under section 302 (d) of the Revenue Act of 1926 as amended (now Internal Revenue Code of 1939, § 811 (d), 53 Stat. L. 121). See Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, 56 S. Ct. 70 (1935). See also Treas. Reg. 80, art. 19 (1937). The principal case is also noted in 24 MINN. L. REV. 886 (1940).